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**BEFORE THE
FEDERAL ELECTION COMMISSION
Office of Complaints Examination and Legal Administration
Attn: Kathryn Ross, Paralegal
999 E. Street, N.W.
Washington D.C. 20463**

SENT VIA EMAIL
cela@fec.gov

RESPONDENTS' ANSWER

American Democracy Legal Fund
455 Massachusetts Avenue NW
Washington, DC 20001

MUR #7287

Complainant,

v.

The Honorable Russell C. Fagg
District Court Judge
13th Judicial District, Department 2
217 N. 27th Street, Room 508
P.O. Box 35027
Billings, MT 59107

Russ Fagg Senate Exploratory Committee
P.O. Box 176
Billings, MT 59103

Respondents.

Introduction

On October 16, 2017, Complainant filed the Complaint, numbered MUR #7287, (Complaint) against Respondents. It alleges violations of the Federal Election Campaign Act of 1971 (the Act) and Federal Election Commission (FEC) regulations. See Comp., p. 1. Specifically, the Complaint alleges Respondent Russell C. Fagg (Respondent Fagg) and his authorized committee, Respondent Russ Fagg Senate Exploratory Committee (Exploratory

Committee), violated the Act by failing to register and file reports with the FEC after his activities triggered candidate status. *See Comp.*, p. 6. Respondents answer the Complaint in accord with 52 U.S.C. § 30109(1).

The Complaint's allegations are misleading and unsupported, if not blatantly contradicted, by the documents attached to it. *See Comp.*, Exs. 1-18. Respondents ask for an expediated review and decision. Based on the procedural mistakes and lack of supporting facts, Respondents respectfully request the FEC dismiss the Complaint and take no further action.

Procedural Background

As a preliminary matter, Respondents object to the lack of a date for the Notary Public's administration of the oath in the Complaint. *See Comp.*, p. 11. *See also* 52 U.S.C. § 30109(a)(1) and 18 U.S.C. § 1001. The date of the oath is important because the Complainant swears the facts are true, but the Complaint alleges demonstrably false facts depending on the date of the sworn testimony. *See Comp.*, p. 2. Complainant filed the Complaint on October 16, 2017. *Comp.*, p. 1. It alleges as a fact that "Russell C. Fagg *currently* serves as a district court judge for the Montana 13th Judicial District." *Comp.*, p. 2 (emphasis added). There is no dispute Respondent Fagg resigned from his position as judge on October 13, 2017. *See attached Ex. 1.*, p. 1 (Affidavit of Respondent Fagg). Further, the Complaint's exhibits demonstrate Respondent Fagg notified people of the date of his resignation as early as June 6, 2017. *See e.g. Comp.*, Ex. 2 (Newspaper article, dated June 6, 2017, reports Fagg will resign as judge on October 13, 2017.).

When a person files a complaint with the FEC, the complaint must be "in writing, signed and sworn to by the person filing such a complaint." 52 U.S.C. § 30109(a)(1) (emphasis added). The complaint "shall be notarized, and *shall be made under penalty of perjury* and subject to the provisions of section 1001 of Title 18." *Id* (emphasis added).

Here, Complainant knew or should have known that Respondent Fagg was no longer a judge when it filed the Complaint with the FEC on October 16, 2017. *See* Comp., Ex. 2. Under the penalty of perjury, Complainant filed a false statement. *See* Comp., p. 2. Complainant's reckless disregard of the truth evidences the propensity to make sensational statements, now, and worry about the truth, later. Based upon the improper oath alone, Respondents respectfully request the FEC dismiss the Complaint. 52 U.S.C. § 30109(a)(1).

Factual Background

Respondent Fagg resigned from his position as judge on October 13, 2017. Ex. 1, p. 1. After serving as a judge for over 22 years, he wanted to explore different options in law or politics. Ex. 1, p. 1. One of his many options was a possible bid for a seat in the United States Senate in 2018. Ex. 1, p. 1.

While Respondent Fagg considered his future options, he also weighed how his resignation may impact other judges and parties to cases filed in the Montana Thirteenth Judicial District Court, Yellowstone County. Ex. 1, p. 1. Yellowstone County is the most populated county in Montana. Ex. 1, p. 1. The judges in the Thirteenth Judicial District Court have the most cases of any district court in Montana. Ex. 1, p. 1. Respondent Fagg wanted to minimize the adverse impacts of an increased case load on other judges and unnecessary delays for parties. Ex. 1, p. 1. Consequently, he gave notice on June 6, 2017 that he would resign effective October 13, 2017. *See* Comp., Ex. 2 (Billings Gazette article, dated June 6, 2017). Respondent Fagg reasonably believed that four months gave him and others sufficient time to minimize the consequences of his resignation, regardless of his future path. Ex. 1, p. 1.

Respondent Fagg set up his Exploratory Committee on June 14, 2017 to help decide whether he should run for the United States Senate. *See* Comp., Ex. 3 (Political Organization

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Notice of Section 527 Status (IRS Form 8871)). When he started the Exploratory Committee, he read the applicable rules and regulations including 11 C.F.R. §§ 100.72 and 100.131. He also read the FEC's publication *Testing the Waters*, dated March 2011. *See attached Ex. 2.* He wanted to understand the appropriate activities for an exploratory committee to test the waters of candidacy. Ex. 1, p. 1. He also wanted to determine the appropriate amount of money to fund an exploratory committee. Ex. 1, p. 1.

To further clarify the issues and rules, Respondent Fagg called the FEC as suggested in its publications. Ex. 1, p. 1 and Ex. 2. The FEC's representative explained that \$250,000 is a reasonable amount of money to explore a bid for the U.S. Senate. Ex. 1, p. 2.

Respondents then limited their activities in good faith to testing-the-waters activities. The sole purpose of Respondents' activities was to help Respondent Fagg determine whether he should become a candidate for the United States Senate. The Exploratory Committee raised funds in an amount less than \$250,000. *See Ex. 1, p. 2.*

In the interest of brevity, Respondents shall answer the allegations by looking directly at the facts in the Complaint's exhibits. *See Comp., Exs. 1-18.* Contrary to the Complaint's bombastic allegations, the facts exonerate Respondents from any wrongdoing in this matter. *See Comp., Exs. 1-18.*

Legal Analysis

An individual becomes a candidate for federal office, when the person receives or spends more than \$5,000 in "contributions" and "expenditures." 52 U.S.C. § 30101(2). The Act and FEC's regulations allow, however, an individual the opportunity to determine whether there is sufficient political support for a candidacy before becoming a candidate. *See 11 C.F.R. §§ 100.72(a)(Exemption from the definition of contribution) and 100.131(a)(Exemptions for*

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definition of expenditure). *See also* FEC Advisory Opinion 1981-32 (Askew) at 4 (Oct. 2, 1981). Money raised or spent solely to “test the waters” does not count toward the \$5,000 threshold, until the individual decides to run for office or conducts activities that indicate the decision to become a candidate. *Id.* *See also* FEC Advisory Opinion 2015-09 (Senate Majority PAC and House Majority PAC) at 5-6 (Nov. 13, 2015). To determine whether the individual decided to become a candidate and whether the testing-the-waters exemption applies, the FEC looks objectively at the individual’s activities. *Id.* at 6. *See* FEC Matter Under Review 5363 (Sharpton), Factual and Legal Analysis at 7-8 (Nov. 13, 2003). An inadvertent statement does not, however, necessarily indicate the individual has decided to become a candidate. AO 2015-09 at 6.

FEC’s regulations give examples of permissible activities to test the waters. 11 C.F.R. §§ 100.72(a) and 100.131(a). “Examples of activities permissible under this exemption if they are conducted to determine whether an individual should become a candidate include, but are not limited to, conducting a poll, telephone calls, and travel.” *Id.*

The FEC clarified and expanded what constitutes permissible activities in advisory opinions and matters under review. For example, the FEC determined the following activities did not trigger candidacy if the purpose of the activities was solely to determine the viability of a candidacy: 1) traveling to speak to groups about public issues; 2) employing assistants to coordinate travel arrangements; 3) employing specialists in opinion research to conduct polls; 4) employing political consultants and public relation consultants; 5) renting office space and equipment; 6) preparing and using stationary to correspond with persons who displayed an interest in a potential campaign; 7) preparing and printing biographical brochures and possibly photographs for use at speaking appearances; 8) soliciting contributions for testing-the-waters

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activities; 9) compiling and maintaining information concerning persons who indicated interest in a possible candidacy; 10) organizing advisory groups on issues requiring expertise; 11) sending direct mail solicitations, provided mailings clearly indicate the person has not decided to run for office; 12) appearing at cocktail receptions of prominent businessmen the day after the Republican state convention and meeting with farmers and ranchers. *See* AO 1981-32 at 2-4 (FEC found none of the 14 testing-the-waters activities proposed by former Governor Reubin Askew triggered candidacy.) *See also* FEC Advisory Opinion 1982-3 (Canston) at 2 (March 15, 1982)(FEC approved Senator Canston's request to travel and speak to groups on a variety of public issues and meet with opinion makers.); FEC Advisory Opinion 1985-40 (Republican Majority Fund) at 4 (Former Senator Howard Baker, Jr. could send direct mail solicitations, because the mailings clearly indicated Baker had not yet determined whether he would seek the presidential nomination; he stated the funds were for testing-the-waters activities; the solicitations did not result in amassing campaign funds.); FEC Matter Under Review 6224 (Friona), Factual Legal Analysis at 8-9 (July 14, 2010)(FEC found that appearing on public television and panel commentary appearances or meeting with businessmen, farmers and ranchers did not constitute general public political advertising.).

FEC regulations also list activities as non-exhaustive factors that may trigger candidate status. 11 C.F.R. §§ 100.72(b) and 100.131(b). An individual can indicate that he has gone beyond "testing the waters" and decided to become a candidate by: 1) using public political advertising to publicize an intention to run for office; 2) raising funds in excess of what could reasonably be expected to be used for exploratory activities or undertaking activity designed to amass campaign funds that would be spent after becoming a candidate; 3) making or authorizing statements referring to the individual as a candidate; 4) conducting activity in close proximity to

the election or over a protracted period of time; 5) taking action to qualify for the ballot under state law. *Id.*

Here, the Complaint alleges that Respondent Fagg “clearly exceeded the threshold for candidacy.” Comp., p. 6. The facts contradict the Complaint’s allegations. *See* Comp., Exs. 1-18. The facts demonstrate Respondents tested the waters for approximately four months to determine whether Respondent Fagg should become a candidate in accord with the Act and the FEC’s regulations. After careful contemplation and reflection, Respondent Fagg decided to become a candidate on October 14, 2017, the day he announced his candidacy. Ex. 1, p. 2.

1. The Complaint’s exhibits demonstrate that Respondent Fagg never publicized his intent to run for the United States Senate, until he announced his candidacy on October 14, 2017.

Respondent Fagg never publicized, through public political advertising or otherwise, his intent to campaign for the United States Senate until October 14, 2017. A review of the exhibits supports Respondents’ position.

Exhibit 1 is a directory for people in the 13th Judicial District Court, Yellowstone County. It simply identifies Respondent Fagg’s former position as a judge. It is irrelevant to the Complaint’s allegations.

Exhibit 2 is a Billings Gazette article, dated June 6, 2017. The article reports that Respondent Fagg will resign as judge on October 13, 2017 to start his own law practice. *See* Comp., Ex. 2. The article also explains he “will *consider* a future political career.” Comp., Ex. 2 (emphasis added). The article quotes Respondent Fagg as saying, “I *may* also consider politics, as I am very concerned about the direction our country is going.” Comp., Ex. 2 (emphasis added). Exhibit 2 demonstrates Respondent Fagg was considering his possible future options including politics. Comp., Ex. 2. Exhibit 2 supports Respondents’ position.

Exhibit 3 is the Political Organization Notice of 527 Status (IRS Form 8871) for the Exploratory Committee. *See* Comp., Ex. 3. Individuals may create exploratory committees for the purposes of determining the viability of a candidacy. *See generally* FEC Advisory Opinion 1979-26 (Grassley) at 1 (June 18, 1979). Exhibit 3 is consistent with activities appropriate to test the waters.

Exhibit 4 is a screen shot of a page from Respondents' website. Comp., Ex. 4. It asks the question, "Should Russ Fagg run for Senate?" Comp., Ex. 4. The purpose of the question is clear and unequivocal. Its sole purpose is to help Respondent Fagg determine whether he should become a candidate for the Senate. Again, exhibit 4 supports Respondents' position. *See* Comp., Ex. 4.

Similarly, the Complaint's exhibits 5 through 7 are screen shots of pages from Respondents' website. *See* Comp., Exs. 5-7. Although the exhibits are terrible quality and almost unreadable, the actual website pages identified the exploratory committee on each page. Ex. 1, p. 2. The pages allowed interested Montanans to learn about Respondent Fagg and understand his views on some issues important to them. None of the pages refer to him as a candidate. None of the pages make any promises about his future decisions. In fact, exhibit 6 reiterates the question, "Should Russ Fagg run for Senate?" *See* Comp., Ex. 6. The sole purpose of giving information in this context is to evaluate the response from interested Montanans to help Respondent Fagg determine whether a candidacy is viable. Exhibits 5 through 7 are consistent with permitted activities to test the waters.

Exhibit 8 is another screen shot of a page from the website. Comp., Ex. 8. It allows people to volunteer to help with the Exploratory Committee. *See* Comp., Ex. 8. It does not ask people to volunteer for a campaign. It does not make any statements about Respondent Fagg

being a candidate. It does not promise he will become a candidate in the future. *See* Comp., Ex.

8. The FEC allows individuals to employ people to help determine whether an individual should become a candidate. AO 1981-32 at 2. The fact Respondents allowed interested people to volunteer to help with an exploratory committee does not indicate Respondent Fagg's decision to become a candidate. *Id.* Exhibit 8 is consistent with activities to test the waters. *Id.*

Exhibit 9 is again a screen shot from Respondents' website. It allows interested people to donate to the Exploratory Committee. It is very clear about the purpose of the money. Exhibit 9 reads, in relevant part:

Financial support is a crucial metric *in Russ's decision making process about running* for the U.S. Senate. Your contribution can make the difference between running and not running. Every dollar raised will go toward paying for the *travel, postage, consulting and polling necessary determine whether there's enough support for Russ to run for U.S. Senate.*

See Comp., Ex. 9. As indicated in the plain language of the donation page, Respondents requested the money to fund permissible activities for purpose of testing the waters. *See* 11 C.F.R. §§ 100.72(a) and 100.131(a). *See also* AO 1981-32 at 2-3; AO 1985-40 at 4. Exhibit 9 supports Respondents' position.

Exhibit 10 shows a picture from a family on Respondents' website. Comp., Ex. 10. It shares the fact Respondent Fagg performed an adoption for a wonderful family in Montana. It does not refer to him as a candidate or promise any decision in the future about a candidacy. The sole purpose of sharing the information about Respondent Fagg's experience was to determine whether his experience would resonate with Montanans and help him decide whether he should become a candidate. Like the other activities on the website, exhibit 10 is consistent with activities to test the waters.

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Similarly, the Complaint's exhibit 11 is a screen shot of pages on Respondents' website. *See Comp., Ex 11.* Again, the pages share information to allow interested Montanans to learn about Respondent Fagg. Neither exhibit refers to him as a candidate. None of the pages make any promises about his future decisions: In fact, exhibit 11 indicates Respondent Fagg was undecided about his future on August 10, 2017. Exhibit 11 reads in part, "As I travel the state *exploring whether or not* a run for the Senate is a good idea, I hope we have a chance to meet and talk about it." *See Comp., Ex. 11 (emphasis added).* Respondent Fagg's purpose is clear. His purpose was to travel around Montana, talk to Montanans and evaluate their responses to help him determine the viability of a candidacy. Exhibit 11 is consistent with permissible activities to test the waters. *See AO 1985-40 at 7.*

Exhibit 12 is a Billings Gazette article, dated June 27, 2017. *See Comp., Ex. 12.* The article explains that Respondent Fagg is the "latest Republican *to consider running* for the U.S. Senate." *See Comp., Ex. 12 (emphasis added).* The article reports that "Fagg said he's *forming an exploratory committee* for the 2018 Senate contest and has a website that *asks visitors whether he should enter the race.*" Exhibit 12 demonstrates Respondent Fagg never communicated a decision to run for the Senate in June 2017. Exhibit 12 shows he was "considering running." *Comp., Ex. 12.* It also shows he started a website to ask people whether he should run. *Comp., Ex. 12.* It evidences his desire "to do something", but he never indicates that "something" is necessarily to run for federal office. The fact is private practice lawyers help the people of Montana every day. Exhibit 12 supports Respondents' position.

Exhibit 13 is copy of a post on kx1h.com, dated September 12, 2017. *See Comp., Ex. 13.* It is the clearest article that evidences Respondents' permissible activities to test the waters. *See Comp., Ex. 13.* It reports that Respondent Fagg is "travelling the state, raising money and

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touting prominent endorsement – but insists he is still ‘exploring’ whether to run for the U.S. Senate.” *See* Comp., Ex. 13. Respondent Fagg is quoted as saying, “*No, I am not a candidate at this point, and I made that very clear.*” *See* Comp., Ex. 13 (emphasis added). Exhibit 13 clearly demonstrates Respondent Fagg had not decided to run for the Senate in September 2017. Again, exhibit 13 supports Respondents’ position that they were testing the waters.

Exhibit 14 is another screen shot of page from Respondents’ website, dated August 16, 2017. Comp., Ex. 14. The page links to a video that helps interested Montanans to learn why Respondent Fagg is “considering running” for the Senate. Comp., Ex. 14. It never refers to him as a candidate or makes any representations about his future decisions. In this context, the sole purpose was to evaluate the response from interested Montanans to help Respondent Fagg determine whether a candidacy was viable. Respondent Fagg wanted to know whether his values would resonate with Montanans and generate sufficient support for candidacy. Exhibit 14 is consistent with testing-the-waters activity.

Exhibit 15 is a Billings Gazette article, dated June 13, 2017. *See* Comp., Ex. 15. The article explains that Respondent Fagg will “*consider a run* for public office after retiring from the bench in October.” *See* Comp., Ex. 15 (emphasis added). Exhibit 15 supports Respondents’ position.

Exhibit 16 is a picture of Respondent Fagg with three Montanans. *See* Comp., Ex. 16. It is consistent with exhibit 11. Exhibit 16 shows Respondent Fagg traveled the state to determine whether he should run for the Senate. As he explained on his website, he wanted a chance to meet and talk about the issue. *See* Comp., Ex. 16. *See also* Comp., Ex. 11. The purpose of Respondent Fagg’s travel was to evaluate the response from interested Montanans and help him

determine the viability of a candidacy. Exhibit 16 is consistent with activities designed to test the waters.

Exhibit 17 is a transcript of an interview with Respondent Fagg. Comp., Ex. 17. Again, the interview allowed interested Montanans to learn about Respondent Fagg, and it allowed him to evaluate their response to his experience and positions. The transcript never identifies him as a candidate. To the contrary, he is quoted as saying, "I am not a candidate yet, but like you said, I'm 90% there." Comp., Ex. 17 at p. 1. It makes no promises or representation about his future decisions. Comp., Ex. 17 at p. 1. The interview reveals Respondent Fagg listened and learned about the concerns of Montanans during his travels, but the interview never indicates a decision to run for office. The sole purpose of Respondent Fagg's interview was to evaluate the response from interested Montanans and help him determine whether a candidacy was viable. Exhibit 17 is consistent with permissible activities to test the waters.

Finally, exhibit 18 is a transcript of Respondent Fagg's talk at the Petroleum Club in Billings, Montana. Again, the purpose of the talk was to provide information about Respondent Fagg's experience and views; in return, he wanted to evaluate the response from the crowd to help him decide whether he should run for the Senate. In exhibit 18, Respondent Fagg gives the opinion, "And I think I actually have the best shot *should* I decide to run to take on Senator Tester." Comp., Ex. 18 at p. 2 (emphasis added). During the speech, he made it clear he was still weighing the decision to run.

In summary, Respondent Fagg never publicized, through public political advertising or otherwise, his intent to campaign for the United States Senate until October 14, 2017. As evidenced by the Complaint's exhibits, Respondents limited their activities in good faith to permissible, testing-the-waters activities. The sole purpose of their activities was to help

Respondent Fagg determine whether he should become a candidate for the United States Senate.

The first factor weighs heavily in favor of Respondents.

- 2. *The Complaint never alleges Respondents raised excess funds, and thus, it is not an issue.***

The Complaint never alleges any concerns that Respondents attempted to amass funds.

See generally Comp. The FEC's representative explained that \$250,000 is a reasonable amount of money to explore a bid for the U.S. Senate. Ex. 1, p. 2. The Exploratory Committee raised less than \$250,000 to test the waters. *See* Ex. 1, p. 2. The second factor weighs completely in favor of Respondents.

- 3. *Respondent Fagg neither made nor authorized statements that referred to him as a candidate before October 13, 2017.***

Respondent Fagg neither made nor authorized statements that referred to him as a candidate before October 13, 2017. Respondents discussed in detail the facts from the Complaint's exhibits. *Supra*, pp. 6-11. Respondent will not repeat the analysis here, but a review of the Complaint's exhibits demonstrates that Respondents never referred to Respondent Fagg as a candidate before October 14, 2017. *See* Comp., Exs. 1-18. To the contrary, Respondents were always very clear that Respondent was exploring the possibility of bid for the United States Senate. *Supra*, pp. 6-11. The third factor weighs heavily in favor of Respondents.

- 4. *Respondent Fagg tested the waters for about four months from June 14, 2017 to October 14, 2017 and well before the Republican primary election in June 2018.***

The Complaint never actually argues that Respondents conducted the activities over a protracted time. *See generally* Comp. The Complaint's exhibits show Respondent Fagg started his exploratory committee on June 14, 2017. Comp., Ex. 3. He then announced his candidacy on October 14, 2017. Four months is not a protracted period of time. *See* Advisory Opinion 1981-32 (engaging in proposed testing-the-waters activities beyond a period of several months may

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affect the applicability of the exemption.) *See also* FEC Advisory Opinion 2015-09 (Senate Majority PAC and House Majority PAC) at 6 (Nov. 13, 2015)(FEC regulations do not provide a specific time limit for testing-the-water activities). The fourth factor favors Respondents. *Id.*

5. Respondent Fagg never took any action to qualify for a ballot under Montana law.

The final factor is whether an individual took any action to get on a ballot under state law. Here, there is no dispute that Respondent Fagg never took any action to qualify for a ballot under Montana law prior to October 14, 2017. *See* Ex. 1, p. 2. The fifth and final factor weighs absolutely in Respondent's favor.

Conclusion

Based on the facts, Respondents did not make or authorize any statements or engage in any activity to support a conclusion that Respondent Fagg decided to become a candidate for U.S. Senate and was no longer testing the waters before his formal announcement on October 14, 2017. Accordingly, there is no reason to believe that Respondents violated the Act or FEC regulations. Respondents request the FEC dismiss the Complaint and take no further action in this matter.

DATED this 30 day of October 2017.


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AFFIDAVIT OF RUSSELL C. FAGG

I, Russell C. Fagg, being duly sworn, testify:

1. I resigned from my position as judge on October 13, 2017.
2. After serving as a judge for over 22 years, I wanted to explore different options, in law or politics.
3. One of my many options was a possible bid for a seat in the United States Senate in 2018.
4. While I considered my future options, I also weighed how my resignation may impact other judges and parties to cases filed in the Montana Thirteenth Judicial District Court, Yellowstone County.
5. Yellowstone County is the most populated county in Montana.
6. The judges in the Thirteenth Judicial District Court have the most cases of any district court in Montana.
7. I wanted to minimize the adverse impacts of an increased case load on other judges and unnecessary delays for parties.
8. I reasonably believed that four months gave myself and others sufficient time to minimize the consequences of my resignation, regardless of my future path.
9. When I started the Exploratory Committee, I read what I understood to be the applicable rules and regulations including 11 C.F.R. §§ 100.72 and 100.131.
10. I also read the FEC's publication *Testing the Waters*, dated March 2011.
11. I wanted to understand the appropriate activities for an exploratory committee to test the waters of candidacy.
12. I also wanted to determine the appropriate amount of money to fund an exploratory committee.
13. To further clarify the issues and rules, I called the FEC as suggested in its publications.

EXHIBIT

14. The FEC's representative explained that \$250,000 is a reasonable amount of money to explore a bid for the U.S. Senate.
15. The Exploratory Committee raised funds in an amount less than \$250,000.
16. The pages of the Exploratory Committee's website identified the fact it is an exploratory committee before October 14, 2017.
17. I never took any action to qualify for a ballot under Montana law prior to October 14, 2017.
18. After careful contemplation and reflection, I decided to become a candidate on October 14, 2017 and announced my candidacy the same day.

DATED this 30th day of October 2017

Russell C. Fagg

STATE OF MONTANA

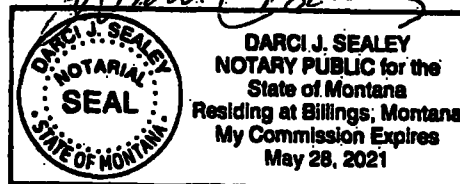
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County of Yellowstone

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This instrument was acknowledged before me on this 30th day of October 2017 by Russell C. Fagg.



Testing the Waters

Federal Election Commission
Published in March 2011

Introduction

Before deciding to campaign for federal office, an individual may want to "test the waters"—in other words, explore the feasibility of becoming a candidate. An individual who merely test the waters, but does not campaign for office, does not have to register or report as a candidate even if the individual raises more than \$5,000—the dollar threshold that would normally trigger registration. Nevertheless, funds raised to test the waters are subject to the Federal Election Campaign Act's (the Act) contribution limitations and prohibitions. See Advisory Opinion 1998-18.

Once an individual begins to campaign or decides to become a candidate, funds that were raised or spent to test the waters apply to the \$5,000 threshold for qualifying as a candidate. 11 CFR 100.72(a) and 100.131(a). Once that threshold is exceeded, the individual must register with the FEC (candidates for the House of Representatives) or the Secretary of the Senate (candidates for the Senate), and begin to file reports.

Testing the Waters vs. Campaigning

An individual may conduct a variety of activities to test the waters. Examples of permissible testing-the-waters activities include polling, travel and telephone calls to determine whether the individual should become a candidate. 11 CFR 100.72(a) and 100.131(a).

Certain activities, however, indicate that the individual has decided to become a candidate and is no longer testing the waters. In that case, once the individual has raised or spent more than \$5,000, he or she must register as a candidate. Intent to become a candidate, for example, is apparent when individuals:

- Make or authorize statements that refer to themselves as candidates ("Smith in 2012" or "Smith for Senate");
- Use general public political advertising to publicize their intention to campaign;
- Raise more money than what is reasonably needed to test the waters or amass funds (seed money) to be used after candidacy is established;
- Conduct activities over a protracted period of time or shortly before the election; or
- Take action to qualify for the ballot. 11 CFR 100.72(b) and 100.131(b).

Contribution Limits

Contribution limits apply to all the support given to an individual who is testing the waters. The limits apply, for example, to:

- Gifts of money, goods and services;
- Loans (except bank loans);
- Certain staff advances until repaid;
- Endorsements and guarantees of bank loans; and

- Funds given or personally loaned to the individual to pay for his or her living expenses during the testing-the-waters period.

For additional information on contributions, including current contribution limits, please review the FEC's Contributions Brochure.

Prohibitions

An individual who is testing the waters must comply with the Act's prohibitions. The Act specifically prohibits money from:

- Labor organizations (although funds from a labor separate segregated fund are permissible);
- Corporations, including nonprofit corporations (although funds from a corporate separate segregated fund are permissible);
- Foreign nationals; or
- Federal government contractors.

11 CFR 114.2(a),(b), and (d), 110.20(a)(3), 115.2.

Recordkeeping

An individual who tests the waters must keep financial records. If the individual later becomes a candidate, the money raised and spent to test the waters must be reported by the campaign as contributions and expenditures. 11 CFR 101.3. The money raised and spent for testing the waters must be disclosed on the first report the principal campaign committee files.

Separate Bank Account

Although this is not a requirement, an individual who tests the waters may want to consider segregating testing-the-waters funds from personal funds by setting up a separate bank account for the deposit of receipts and the payment of expenses. If the individual later becomes a candidate, a campaign account must be established to keep campaign funds separate from anyone's personal funds. 11 CFR 102.10, 102.15, 103.2, 103.3(a).

Organizing a Testing-the-Waters Committee

An individual may organize a committee for testing the waters. An exploratory committee or a testing-the-waters committee is not considered a political committee under the Act and is not required to register with the FEC or to file reports. The name of the testing-the-waters committee and statements made by committee staff must not refer to the individual as a candidate. Thus, for instance, a testing-the-waters committee may be named "Sam Jones Exploratory Committee," but not "Sam Jones for Congress."

If the committee's activities go beyond the testing the waters and the committee begins to campaign, the committee must register with the FEC. The funds raised during the testing-the-waters phase automatically become contributions, and the funds spent, including polling costs, become expenditures. These contributions and expenditures count toward the threshold that triggers candidate status. Once the contributions exceed \$5,000, the individual becomes a candidate and must register under the Act. To download registration and reporting forms, please visit the FEC webpage for "Forms for Candidates and Authorized Committees."

If an individual decides not to run for federal office, there is no obligation to report these finances, and the donations made to the testing-the-waters committee will not count as contributions.

Assistance from the Commission

Further information on organizing a campaign committee can be found in the Campaign Guide for Congressional Candidates and Committees. [PDF]

The Commission operates a public information office to help campaigns and other political committees understand and comply with the campaign finance laws. You can call the office toll-free, 800/424-9530, or e-mail, info@fec.gov, if you have any questions on this brochure or other aspects of the law. FEC staff are waiting to help you.

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FEDERAL ELECTION COMMISSION

999 E Street, NW

Washington, DC 20463

STATEMENT OF DESIGNATION OF COUNSEL

Please use *one* form for each Respondent/Entity/Treasurer

FAX (202) 219-3923

MUR # 7287

NAME OF COUNSEL: David P. Legare

FIRM: David Legare Law

ADDRESS: 100 N. 27th St., Suite 550

Billings, MT 59101

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FAX (406) 294-9451 Web Address dplegare@legarelaw.com

The above-named individual and/or firm is hereby designated as my counsel and is authorized to receive any notifications and other communications from the Commission and to act on my behalf before the Commission.

**10/27/17
Date**

**[Signature]
Respondent/Agent - Signature**

**Candidate
Title (Treasurer/Candidate/Owner)**

**RESPONDENT: Russ Fagg Senate Exploratory Committee
(Committee Name, Company Name, or Individual Named in Notification Letter)**

**MAILING ADDRESS: P.O. Box 176
(Please Print)**

Billings, MT 59103

TELEPHONE- HOME _____

BUSINESS (_____) _____

Information is being sought as part of an investigation being conducted by the Federal Election Commission and the confidentiality provisions of 2 U.S.C. § 437g(a)(12)(A) apply. This section prohibits making public any investigation conducted by the Federal Election Commission without the express written consent of the person under investigation



FEDERAL ELECTION COMMISSION
999 E Street, NW
Washington, DC 20463

STATEMENT OF DESIGNATION OF COUNSEL
Please use *one* form for each Respondent/Entity/Treasurer
FAX (202) 219-3923

MUR # 7287

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